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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

No. 70-223

CENTRAL HARDWARE COMPANY,
Petitioner,
vs.
NATIONAL LABOR RELATIONS BOARD,
Respondent,
and
RETAIL CLERKS UNION, LOCAL 725, RETAIL CLERKS INTERNATIONAL ASSOCIATION, AFL-CIO,
Intervenor.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

PETITIONER'S REPLY BRIEF

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INTRODUCTION

Central will limit this Reply Brief to the following two questions:

1. Did the Board *prove* by substantial evidence in the record that the employees were inaccessible to the Union organizers except by contacting them on Central's lots?

2. Are Central's parking lots "quasi-public" thereby making *Logan Valley* applicable?

REPLY ARGUMENT

Accessibility of Employees

This Court, in *N.L.R.B. v. Babcock & Wilcox Co.*, 351 U.S. 105 (1956) clearly and simply stated that a union organizer could freely enter upon an employer's parking lot *only if* "the inaccessibility of the employees makes ineffective the reasonable attempts by non-employees to communicate with them through the usual channels." 351 U.S. at 112. Therefore, it is clear that the Board has the burden of proving both that the employees were otherwise inaccessible and that reasonable attempts to communicate with them through usual channels was ineffective. Judge Gibson, in his dissent in the instant case, states, "The burden was not on the Company to show that conventional means of communication and access were open, but the contrary burden rests with the General Counsel" (App. p. 89).

The majority below found, by innuendo, that there were other reasonable means of communication available to the Union to reach the employees other than by communicating with them on Central's lots. Judge Gibson specifically found that such alternate means were, in fact, available (App. p. 89). It could be stated that the Board, itself, conceded the fact of "accessibility" when it stated: "The only issue here, therefore, is whether the Board's finding that the Company's parking lots were opened to the public to the extent as to render the situation similar to that in *Logan Valley* is supported by the record." (Brief of N.L.R.B. In Opposition, pg. 5.) However, inasmuch as the Board is now attempting to raise this as an issue, Central will direct itself to same.

With respect to this issue, the briefs filed by the Board, the Union and the Amicus Union follow the same pattern

as the Board's Decision and Order and the Trial Examiner's Decision. That pattern is to either totally ignore the facts established by testimony on the record, or to reach outside the record and "supply" facts.

The Board and both unions urge this Court to believe that a great number of Central's employees lived in remote, inaccessible areas during the organizational campaign. Instead of evidence from the record, they substitute vague terms as, "lived in widely scattered sections" and "some have rural addresses difficult to locate." The uncontroverted facts, on the record (App. pp. 134-135), clearly established that out of approximately 250 employees, 57% lived within 5 miles, 74% lived within 10 miles, and 88% lived within 15 miles of their work place. In addition, the Union knew the names, addresses, job descriptions and telephone numbers of 80% of those employees.

They would have this Court believe that Union organizers attempted to visit employees at their homes and, after a diligent effort, had to abandon this method of communication, since they were unable either to locate the homes or to find the employees at home.

However, neither the Board nor the Union placed *any* testimony *in the record* about an actual home call by an organizer on a single Central employee. The only testimony in the record on this issue was presented by *Central* in the cross-examination of Mr. Kapetanakis, the union organizer, when he testified to his *one* instance of calls on 50 or 60 employees at their homes *one day* (App. pp. 98-99, 102-103). Although he had telephone numbers of those employees, there is no testimony that he attempted to make appointments. Instead, he chose the method of "cold calls" as earlier characterized by the Board itself in its Eighth Circuit brief.

The Board and unions have now attempted in their briefs to expand this *one* isolated instance of house calling into evidence that "home calls proved ineffective," or variations thereof (Brd. Br. pg. 11, Union Br. pg. 12, Amicus Union Br. pg. 11) to satisfy the requirement that they *prove* that house calling, the *most effective* tool of organizing (App. p. 183), was virtually impossible. The true fact is that *one* organizer took an employee list with him *one* afternoon and made 50 or 60 "cold calls" without even one telephone call or appointment so as to be certain the employee might be at home. Even by this casual and impromptu approach at organizing, the organizer found 10 of the employees at home (App. pp. 102-103). Considering the fact that he was able to make contact 20% of the time under these circumstances certainly should have influenced the Director of Organizing to give more thought to house calls on a perhaps more organized basis.

The Board and unions, apparently recognizing that house calling is not the only channel of communication open to organizers, go to great lengths to "supply" instances of other forms of communication having proved ineffective. All three seem to recognize that radio, newspapers, handbilling at Central's access points, scheduled meetings at the Union hall, etc. are all "usual channels of communication". However, instead of setting forth, *from the record,* the specific instances of where an organizer had been ineffective in his actual attempt to utilize a specific channel, they endeavor to make up for their failure to produce *evidence* on the alternate means of communication by giving the excuse that such communication "would have been impractical and inefficient", or "would have resulted in traffic congestion", or, "would not be able to reach the employees effectively", or, "would have been all but impossible" (Brd. br. p. 11, Union br. pp. 13, 14, Amicus br. p. 12) based mainly on the fact that In-

dianapolis is a metropolitan area. There is no testimony, whatsoever, in the record of even a single instance in which a Union organizer actually used any of these usual channels of communication and found Central's employees inaccessible, even though it was conceded that most of Central's employees would regularly be reading two newspapers of general circulation and the Union had a method to learn the names of Central's employees who drove automobiles to work (App. pp. 188-189, 205-206).

In attempting to eliminate a particular channel of communication on the basis that it *might* have proved ineffective and, therefore, arguing that there was no *Babcock* obligation to even attempt it, the Board is apparently ignoring its own decisions in *Monogram Models, Inc.*, 192 NLRB No. 99 (1971) and *The Falk Corporation*, 192 NLRB No. 100 (1971), both of which were decided within the last few months. The Board declared in *Monogram Models*:

> "It is also claimed that other conventional methods of communication, such as mail, telephone, and home visits were not available and do not constitute feasible means of communication because the employees here involved live in a large metropolitan area which makes them just as inaccessible as others who live and work wholly on an employer's property.
>
> We cannot subscribe to this generalization. We do not believe it wise or proper to adopt a 'big city rule' and a different 'smalltown rule' in applying Babcock and Wilcox, or to attempt to determine how big a city must be to justify the proposed differing application. Concededly, it may be more convenient and less expensive for the Union to use the Respondent's property for the purpose of organizing the employees here involved. That was also true under the facts of Babcock and Wilcox. But the test established there was *not* one of relative *convenience*, but rather

whether the 'location of a plant and the living quarters of the employees place the employees beyond the reach of reasonable union efforts to communicate with them . . .' The facts here do not, in our view, justify such a conclusion, and we are unwilling to make that conclusion solely upon the basis of the plant's location in a metropolitan area." (Emphasis supplied.)

To even more clearly distinguish between an attempt to communicate and *thinking* about attempting, the Board, in *Monogram Models,* added a footnote:

"(5) We note that the Trial Examiner's conclusion as to the 'unavailability' traditional alternatives, such as the use of sound trucks, organizational meetings, radio and newspaper communications, and the like are based on the *urban* setting of this case. The factual testimony was simply that these alternative means of communication *had not been tried.*" (Emphasis supplied.)

The Union is quick to point out that these recent cases only involved property that had not been opened to the public. However, in very recent cases where the public was actually invited onto the premises and given visitors' passes, the Courts of Appeal have held that the *Babcock* standards and those, alone, determine the status of a union organizer on private property.

Both *N.L.R.B. v. Kutsher's Hotel and Country Club,* 427 F.2d 200 (2nd Cir. 1970) and *N.L.R.B. v. Tamiment, Inc.,* 451 F.2d 794 (3rd Cir. 1971) involve large resorts, not only open to guests, but also to the public, who were issued visitors' passes. In both of the cases the Courts of Appeal rigidly held that the standards of *Babcock* apply to non-employee union organizers.

The Court below found that the campaign began on May 21, 1968, when "some 9 or 10 organizers from both outside and within the Indianapolis area conducted a

blitz-type campaign'' (App. p. 76). There is no testimony in the record that the organizers attempted to contact Central's employees in any manner nor any place other than the lots during the first weeks of the campaign. The Union's Director of Organizing candidly notes (App. p. 192) that the organizers did not even leave the lots to make a home visit for the first two weeks of the campaign. Consequently, the record is absolutely barren of any evidence that Central's employees were so inaccessible that the usual channels of communication were first found to be ineffective and, therefore, the organizers were entitled to go upon Central's parking lots as a last resort.

The Union will surely argue that the organizers, of necessity, had to start the campaign on the parking lots because they had no other way to identify Central's employees. However, the Court below found (App. p. 75) that, although the organizational campaign actually began on May 21, 1968, the Union had secretly placed Edward Stahl, a paid undercover agent on Central's payroll back in April, when hiring had begun. The Union alludes to this undercover agent as a ''sympathetic employee'' (Union br. pg. 11).

Naturally, Stahl with his paid-for views on self-organization was able to convince others to join him in both advocating unionism and furnishing to the Union employees' names, addresses, telephone numbers and job descriptions starting over a month before the organizational campaign began (App. p. 204). Reprehensible as this ''working from within'' practice may be, it certainly has to be an answer to the Union's contention that the organizers had no way of knowing who Central's employees were at the start of the campaign other than by going onto the parking lots to meet them.

Therefore, Central respectfully urges this Court to find that, under the *Babcock* rule, Central's employees were

not inaccessible and the alternate means of communicating were not *proved* ineffective. *Babcock*, itself, sets out the measure of weight to be given to a Board decision on appeal:

> "Its (Board) rulings, when reached on finding of fact supported by substantial evidence on the record as a whole, should be sustained by the courts unless its conclusions rest on erroneous legal foundations."

Central respectfully submits that the Board's decision, in this case, is not supported by substantial evidence and, in addition, rests on erroneous legal foundations.

Quasi-Public Parking Lots

Arguing this theory, the Board would have this Court reach outside the record to somehow find that Central's parking lots are "quasi-public", "open to and used by the public without restriction", "entry is virtually unlimited", "community business block", and, for the first time, in its most recent brief, "*widely* open to the public" (emphasis supplied).

Although the Board and the Union repeatedly allege that Central's lots are unqualifiedly open to the general public without restriction and that Central benefits from the openness, no testimony appears in the record to support this allegation.

Attempting to make up for this lack of such evidence, the Board cites (Board br. pg. 31) what it considers a "*policy*" of Central's encouraging an exchange of customers with a nearby small inlaid carpet dealer by having them walk from one store's parking lot to the other store. The only testimony concerning this "policy" proves that it would, in fact, be very *unusual* for such an exchange to ever take place (App. p. 123). Surely, the Board must be

required to produce more substantive evidence than this if it is to have this Court find Central's lots comparable to those in *Logan Valley*.

In further attempting to establish a close similarity between the Central lots and Logan Valley Plaza, the Board and Union have characterized the East store as a "shopping center" because it abuts a fenced-off car wash and one entrance road passes by a small one-story, one-tenant construction office. (plot plan at App. p. 239, GC Exhibit 5)

However, in its most recent briefs, the Board, apparently not satisfied with the East store as it appeared on its own Board Exhibit 5 plot plan, has "supplied" a new "exhibit" (Board br. p. 8) adding a "Truck Stop and Grill". Although there is absolutely no testimony in the record concerning a description of this establishment, the Board has "supplied" a building and parking lot almost 70,000 square feet in size for what the Trial Examiner merely referred to as a "truck service station." (App. p. 23)

In addition to supplying the truck lot, the Board's new "exhibit" also shows an "unmarked boundary" between the truck lot and Central's East Store lot, implying that the truck parking lot and the East store lot is one big open parking lot. The transcript, however, clearly sets out that the truck lot is unpaved and is separated from Central's parking lot by a grassy, muddy area six to eight feet wide. (Tr. 864) It was not even possible to drive from Central's parking lot onto the service station's lot. (Tr. 864-5) In fact, there was a six to eight inch abutment on Central's lot separating it from the grassy, muddy area. (Tr. 866-7)

Therefore, the evidence in the record establishes the fact that Central's East Store lot was separated from the service station lot by the six to eight inch abutment and

the six to eight foot grassy, muddy area; from the car wash by a "six-foot fence" (A. 127), leaving only the small one-story, one-tenant office lot unseparated from it.

With respect to the West store's property (plot plan at App. p. 238, GC Exhibit 5), the Board and Union have attempted, in their previous briefs, to characterize it as a "shopping center" because its parking lot abuts the parking lots of two small buildings and, distantly, a McDonald's hamburger stand.

As in the case of the East store, the Board was also apparently not satisfied with the West store as it appeared on its own GC Exhibit 5 plot plan entered in evidence (App. p. 238). Therefore, the Board supplied its own "sketch" of the West store, thereby doubling the actual size of the McDonald's hamburger stand (Board br. pg. 5).

The Board attempts to characterize the stores as bustling shopping centers, always including *language* about "activity or commotion, such as movements of automobiles and pedestrians" (Board br. pg. 36) but never any reference to any *evidence* in the record that would lead to the conclusion that either of these stores is a "shopping center."

The West store is portrayed as a "plaza" through which large numbers of the public pass on a regular basis for a pleasant "one-stop" shopping trip to the local shopping center (Board br. pg. 6). The Board alleges that McDonald's customers must pass through the West store's parking lot in order to reach the McDonald's lot. However, the plot plan clearly shows that a McDonald's customer can reach McDonald's lot by driving 20 feet after he leaves West 38th Street (App. p. 238).

Fashion Square, the so-called "small shopping plaza" is nothing more than two small commercial buildings with their own separate parking lots. The Board's characteri-

zation of these facts as lending to "one-stop shopping" and a "one-stop shop-and-eat outing" obviously taxes this Court's description of a Logan Valley Plaza (Board br. pg. 30).

The evidence in the record concerning the West store establishes that the nearby loan company usually has no more than one or two customers at a time and that the inlaid carpet shop has usually one, but no more than two, salesmen and no more than four customers at a time (Tr. pg. 186-187). Contrary to the Board's contention that these businesses in Fashion Square make it a "small shopping plaza," the fact is that this property was designed for very few customers and certainly is not intended, and does not, in fact, generate traffic for Central's stores (Tr. 188-189). There is no evidence that there is any traffic to or from Central from McDonalds. Therefore, the Board's allegation that Central's stores "had become *widely* open to the public" (Board br. pg. 36) (emphasis supplied) is not substantiated by the evidence.

The Board and the Union have placed great emphasis on the testimony that there are "commercial enterprises, including shopping centers" in the "immediate vicinity" of Central's lots. However, they both fail to add that all of these establishments, other than those shown on the aforesaid plot plans, are separated from Central by divided, four-lane highways, which the Board proved to be extremely heavily travelled. Any attempt to "enclave" these shopping areas with Central would be just as strained as trying to merge Central's stores with shopping areas a mile or more down the highway or across town so as to present a picture of a Logan Valley Plaza situation.

While maintaining that the Central lots are "open to and used by the public *without restriction*" and are "*widely* open to the public," the Board totally ignores the

evidence in the record that numerous non-customers were ejected from the premises on a uniform basis (App. pp. 131-132). There is not *one* instance shown where a non-customer was allowed to remain on Central's premises after being discovered there.

The Board, however, consistently cites its opinion in *Priced-Less Discount Foods, Inc.*, 162 NLRB 872 (1967), as the leading decision involving "a grocery store that stood alone" and holding that the grocery store parking lot served the same public function as a similar facility in a shopping center. The Board found a Section 8 violation when the grocer-employer ejected a union organizer from the parking lot. However, the Board consistently fails to set forth other key points of the *Priced-Less* decision which distinguish it from this case. Those key points are:

> "The *only restriction* on the use of the lot was that the employer tried to prevent people from parking all day . . . Approved solicitation was permitted on the (*Priced-Less*) lot. School children, church organizations, and community drives used the lot for solicitation purposes. In fact, the threatened and actual arrest of the organizer on the lot was the *first* such incident to have occurred". (emphasis supplied)

Central respectfully submits that its own careful and consistent restriction of the use of its parking lots is substantially and materially different from the grocer in *Priced-Less* and totally removes Central's lots from the "open to the public" characterization.

The Board, the Union and the Amicus Union have all set forth their individual interpretations of the *basic* test that makes a parking lot "quasi-public" so that a union organizer can freely enter it. The Board states that *the* test is whether it is "open to the general public for the purpose of shopping at the various stores" (Board br.

pg. 32). The Union, on the other hand, not concerned about any commercial aspect of the premises, states that *the* "test is the openness of the property, not whether it is a part of 'free-standing' store, a shopping center, or some other commercial complex." (Union br. pg. 34).

The Amicus Union is to be lauded for its candor on *the* test to be used and the ultimate result of adopting such a test. It states that "The balance is to be struck, we suggest, by weighing the financial cost to the employer of allowing entry against the increased cost to the union of establishing personal contact with all of the employees off the plant site." (Amicus br. pg. 17)

The Amicus Union even forecasts one result of such a test: "We would be less than candid if we did not state that the suggested rule advanced here would most probably open company property to unions on many occasions." (Amicus br. pg. 20)

Central respectfully submits that the end result of all of the Board and union theories on this point can only lead to the immediate destruction of the concept of privacy.

Since all three of these tests rely on the union organizer's exercising a "First Amendment, free speech right" and not solely Section 7 rights, all members of the public wishing to exercise free speech rights could lawfully enter *any* private property or a private residence if any one of the suggested tests were met, even against the wishes of the owner or homeowner, and irrespective of the message to be communicatd.

Reducing the Board and Union's unsubstantiated "quasi-public," "widely open without restriction" argument to its most basic premise, can inescapably lead to only one conclusion: the mere fact that each Central store

has a parking lot and invites prospective customers to park on that lot while shopping at Central *automatically* makes those lots *public* property for anybody to use for *any* purpose.

This Court has heard and emphatically rejected this same argument many times in the past. Facing a similar argument in *Adderly v. State of Florida*, 385 U.S. 39 (1967), Justice Black declared:

> "Such an argument has as its major unarticulated premise the assumption that people who want to propagandize protests or views have a constitutional right to do so whenever and however and wherever they please. That concept of constitutional law was vigorously and forthrightly rejected in two of the cases petitioners rely on. We reject it again." 385 U.S. at 47.

In summary, Central respectfully petitions this Court to view the two Central stores in the hard light of the recorded evidence, one store being near a car wash and the other near a few small, low-traffic shops with their own parking lots, and to hold that neither of them resemble Logan Valley Plaza to the extent that its lots have become "quasi-public" property.

CONCLUSION

For the reasons stated herein, this Court is respectfully requested to reverse the Court of Appeals for the Eighth Circuit on the issues presented and to hold:

1. That under the standards set forth in *Babcock* Central's rule is valid and the union organizers were lawfully excluded from Central's lots because the employees were accessible elsewhere and the rule was not discriminatorily applied.

2. That Central's parking lots have not attained a "quasi-public" status and Central retains the right to bar union organizers from the lots.

Respectfully submitted

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